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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AKBAR BAHARIAN-MEHR,

Plaintiff and Appellant,

v.

SGRL INVESTMENTS, INC., et al.,

Defendants and Respondents.

G047929

(Super. Ct. No. 30-2009-00118060)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Bruce W. Wagner for Plaintiff and Appellant.

Brown & Charbonneau and Gregory G. Brown for Defendant and Respondent SGRL Investments, Inc.

Law Offices of David J. Harter and David J. Harter for Defendant and Respondent. E. Glenn Smith.

Borchard & Callahan, Thomas J. Borchard and Janelle M. Dease for Defendant and Respondent Leroy M. Smith.

* * *

Plaintiff Akbar Baharian-Mehr appeals from the judgment in this dispute between himself and his partners in an adult entertainment business, SGRL Investments, Inc. (SGRL), Leroy Smith, E. Glenn Smith, and Theron Smith (collectively defendants). He argues the trial court failed to provide an adequate statement of decision and that a number of its conclusions on the issues were not supported by substantial evidence. We conclude that neither contention has any merit and therefore affirm.

I

FACTS

We draw the facts primarily from the statement of decision. In November 2001, Baharian-Mehr and Leroy Smith entered into a general partnership agreement to establish an adult entertainment business, later known as Imperial Showgirls, in Pico Rivera. E. Glenn Smith (Glenn), Leroy's brother, and Theron Smith,¹ another relative, were subsequently brought into the business for funding purposes. Glenn's participation was the subject of an addendum to the general partnership agreement. (The general partnership agreement and its addendum are subsequently referred to as the partnership agreement.) Glenn loaned the business \$134,750, and Theron loaned \$110,750. The funding structure was reflected in the company's books and records from 2002 onward.

The partnership agreement stated: "It is understood and agreed between both 'PARTIES' that upon securing the permit to operate, a corporate structure shall be formed for the 'BUSINESS' and the tangible and the intangible assets of the 'BUSINESS' shall be merged" Accordingly, on December 17, 2001, SGRL was incorporated.

¹ Due to their common surname, we subsequently refer to these individuals by their first names. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.) Theron is not a party to this appeal and is therefore mentioned only as relevant.

Until July 15, 2002, Glenn Smith was SGRL's sole shareholder. On that date, after the operations permit had been obtained, business assets were transferred into SGRL, and the shares of stock were redistributed according to the percentage of the ownership interest held by each party. Baharian-Mehr held 15 percent, Leroy held 35 percent, and of Glenn's 50 percent interest, 25 percent was held by him and 25 percent was held by Theron. On the same date, the board "discussed . . . the acceptance of the terms of [the partnership agreement] as to operation of the adult entertainment business known as Showgirls . . . and placement of said business into the corporation. [¶] Upon motion duly made, seconded, and carried, the following resolution was adopted. [¶] RESOLVED, that [the partnership agreement and its addendum] are hereby accepted by the Corporation."

The business operated from 2002 to 2009 and generated income that was, from time to time, distributed to the shareholders. SGRL operated the business, and no tax returns were ever filed for the partnership. Leroy ran the business on a day-to-day basis, and there were no relevant disputes between the owners until 2007.

In 2007, Baharian-Mehr and Leroy opened a business in La Mirada, and a dispute arose over that business in July. On August 26, Baharian-Mehr resigned as an officer of SGRL. In March 2008, he alleged that he was assaulted and battered by Leroy in the parking lot of Imperial Showgirls, although he did not make a police report and apparently suffered no physical injury.

Around August 2008, the dispute regarding the La Mirada business settled. In September, Baharian-Mehr sent a draft complaint to SGRL which set forth his claims regarding Imperial Showgirls. On August 31, 2009, Imperial Showgirls closed. The closing was pursuant to a consent decree related to Pico Rivera zoning issues that had been agreed to by all of the shareholders several years earlier. In February 2009, SGRL discontinued dividend payments to the shareholders to ensure there were sufficient funds to satisfy creditors.

On June 4, 2009, Baharian-Mehr filed his complaint against SGRL, Leroy, Glenn and Theron. His claims included causes of action for accounting, preliminary and permanent injunctions, breach of fiduciary duty, constructive fraud, constructive trust, breach of contract, assault, battery, and declaratory relief. Substantively, Baharian-Mehr's claims were based on a number of issues, including the characterization of the initial funding as loans as opposed to capital contributions, the purported obligation to obtain Baharian-Mehr's consent to every expenditure and business decision, the resulting mismanagement and unapproved expenditures, the board's failure to declare dividends, and the alleged assault and battery by Leroy. He pled his claims directly against the corporation, and not as derivative claims.

The matter came on for bench trial in September and October 2012. At the conclusion of Baharian-Mehr's case, the defendants moved for judgment under Code of Civil Procedure section 631.8, and the court granted the motions. Baharian-Mehr requested a statement of decision, and an amended statement of decision was issued in January 2013. Baharian-Mehr now appeals.

II

DISCUSSION

A. Statement of Decision

Baharian-Mehr's first complaint is about the amended statement of decision (the statement of decision). He claims it fails "to make requested factual findings on essential elements of a claim." Baharian-Mehr initially requested a statement of decision that asked the court to explain its findings on 23 separate, specific questions. The court directed defendants to prepare a proposed statement of decision, which they proceeded to do. Baharian-Mehr's subsequent objection listed a number of issues that the proposed statement of decision purportedly failed to address. The trial court overruled the objections, but nonetheless directed defendants to include a factual recitation that provided context to the factual conclusions included in the proposed statement of

decision. Defendants made amendments and submitted an amended proposed statement of decision. Baharian-Mehr again objected, this time expanding his objections to 12 separate grounds, two of which addressed the newly added factual recitation, five of which argued the statement did not address a principal controverted issue, with the remaining five objections asserting various other grounds. The trial court overruled the objections and signed and filed the statement of decision.

The statement of decision is 12 pages long, and includes detailed factual and legal findings. In addition to the facts as discussed above, the court found, in sum: 1) pursuant to applicable law, the partnership did not survive the formation of SGRL, and accordingly, Baharian-Mehr cannot look to the partnership agreement to support his claims for breach of contract; 2) Baharian-Mehr proceeded with direct, rather than derivative claims, which are mutually exclusive and cannot be maintained in the same action; 3) Baharian-Mehr was aware “all along” that the money Glenn and Theron put into the business was going to be characterized as a loan, not a capital contribution, and benefitted from that characterization; 4) when dividends were paid, they were paid properly, and defendants acted correctly when they decided not to pay dividends; 5) Baharian-Mehr failed to meet his burden to show any breach of fiduciary duty, constructive fraud, or imposition of a constructive trust; 6) Baharian-Mehr’s claims regarding mismanagement of the company had no merit; 7) defendants’ actions fell within the protection of the business judgment rule; 8) even if Baharian-Mehr could prove liability on some theory, he did not prove any damages; 9) an accounting was not necessary, because SGRL’s books and records were in order; 10) Baharian-Mehr did not establish that Leroy took any money to which he was not entitled; 11) Baharian-Mehr did not meet his burden to prove that Leroy assaulted or battered him; 12) no basis existed for an injunction. The statement of decision also included a section which addressed specifically why it declined to make certain findings requested by Baharian-Mehr.

Statements of decision are governed by Code of Civil Procedure section 632, which provides, in relevant part: “The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial.”

“A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. [Citations.]” (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.) Further, “[i]t is settled that ‘[i]n rendering a statement of decision . . . a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court’s determination would reversible error result.’” (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.)

Baharian-Mehr complains the trial court failed to make findings on the following issues: “(a) whether the parties to the General Partnership Agreement and Addendum used SGRL Investments, Inc. to carry out the terms of the General Partnership Agreement and Addendum

“(b) whether or not SGRL Investments, Inc.’s acceptance of the General Partnership Agreement and Addendum by corporate resolution constitutes a ratification of the General Partnership Agreement and Addendum

“(c) whether or not SGRL Investments, Inc. had the right to unilaterally terminate its obligations under the General Partnership Agreement and Addendum

“(d) whether or not SGRL Investments, Inc. had the right to rescind its adoption of the General Partnership Agreement and Addendum

“(e) whether or not improper management of Imperial Showgirls resulted in the failure to pay employees for earned overtime resulting in SGRL Investments, Inc. paying settlement damages to former employees to settle their labor lawsuits.”

These, however, are evidentiary facts, not ultimate facts. Many of these facts are addressed in the statement of decision in one way or another; for example, the statement of decision clearly states that the partnership did not survive the formation of the corporation. That dispenses with the first four issues noted above, because the partnership no longer existed as of the moment the corporation was formed. As to the final issue, the court found that the issue of mismanagement would be derivative in nature, and direct and derivative claims cannot be maintained in the same lawsuit. Thus, the ultimate issues relating to these evidentiary facts were both decided and discussed by the court in the statement of decision, which was perfectly adequate.

B. Substantial Evidence

Baharian-Mehr next offers a number of issues on which he contends the court did not have substantial evidence to find in defendants' favor.²

“A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics.)

“When findings of fact are challenged in a civil appeal, we are bound by the familiar principle that ‘the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below. [Citation.] We view the evidence most

² As a threshold matter, we reject SGRL and Glenn’s argument that the record was improperly designated. There is more than enough evidence in the record to both consider the case, and, ultimately, affirm the judgment. To the extent Baharian-Mehr referred to any document not included in the record, we simply disregard that portion of his argument.

favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.] Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. [Citation.]” (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.) The testimony of a single witness may alone constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

We do not reweigh the credibility of witnesses or resolve conflicts in the evidence. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) Further, this court is bound by implied findings made by the trial court, such as rejecting a witness’s testimony. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182.)

At numerous points, Baharian-Mehr attempts to turn this standard of review by implying or arguing that there was sufficient evidence to support findings of fact that would have been beneficial to him. That, however, is not how we review for substantial evidence. If there is substantial evidence to support the court’s findings, then we affirm.

1. Partnership Agreement and the Formation of SGRL

Baharian-Mehr first asserts the trial court’s conclusion that the partnership agreement did not survive the formation of SGRL was not supported by substantial evidence. The trial court concluded: “The general rule, as explained in *Per[s]son v. Smart Inventions, Inc.*, is that when a corporation is formed by the members of a partnership, after the partnership is formed, the partnership ceases to exist when the corporation arises with certain exceptions. (2005) 125 Cal.App.4th 1141. The Court finds that the exceptions set forth are not applicable in this case.”

As that case explains, the first exception is when the corporation was ancillary to the partnership, and the corporation was formed to carry out some minor function. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1158-1159 (*Persson*).) The second exception is an equitable doctrine that applies where it would be

inequitable under the circumstances to find the corporation supersedes the partnership agreement. (*Id.* at p. 1159.)

Here, the court concluded that the partnership was formed for the purpose of owning and operating Imperial Showgirls. While there were some ambiguities in the relevant documents, the court did not find these to be significant, and the “vast majority” of statements and conduct showed the corporation was superseding the partnership agreement. The court found that when the parties “accepted” the partnership agreement, as reflected in SGRL’s minutes, it was not in the nature of accepting a contractual obligation, but of recognizing the proportional ownership interests.

There was more than sufficient evidence to support the court’s conclusions. The partnership agreement itself stated that once the permit to operate was secured, a corporate structure would be formed and the assets merged. This is exactly what happened — after the permit for operation was obtained, the assets were transferred into SGRL and SGRL’s shares of stock were redistributed in proportion to each party’s ownership interests. The evidence also demonstrated that the business was operated through SGRL, which made distributions to its shareholders from time to time. SGRL filed corporate tax returns, while none were filed for the partnership.

Given these facts, the trial court had ample evidence from which it could conclude the partnership agreement did not survive incorporation. The first exception to the general rule did not apply because the facts did not support that the corporation was ancillary to the partnership; indeed, it was the other way around. With respect to the equitable exception, the trial court found it did not apply, and Baharian-Mehr makes no real case that merging the corporation and partnership was an inequitable result.

Baharian-Mehr’s somewhat confusing argument appears to be that the general rule that partnerships do not survive incorporation does not apply because there was a “preincorporation agreement,” specifically the partnership agreement. But that would be the exception that swallowed the rule. He argues that “SGRL impliedly admits

that it was bound [by] the partnership agreement . . . by its attempt to revoke its acceptance of the partnership” without an argument as to why this should be conclusive in the face of the other evidence.

He also argues that “in *Persson*, there was no preincorporation agreement that provided the parties were fiduciaries to each other leading to the court’s conclusion that the partnership did not survive formation of the corporation.” But he then goes on to remind us that, as a matter of law, partnership is always a fiduciary relationship. Indeed, the parties in *Persson* “were partners in a formal partnership until 1994, when they terminated the formal partnership and began to operate as a corporation.” (*Persson*, *supra*, 125 Cal.App.4th at p. 1156.) Thus, he is simply wrong about the factual posture of the case.

Finally on this point, he argues that partners may, by agreement, continue the partnership in conjunction with their relationship as stockholders in a corporation. This is true. (*Persson*, *supra*, 125 Cal.App.4th at p. 1158.) He then points to the evidence he believes supports his claim of such an agreement, which would be relevant if we were the trial court. But we are not, and he fails to argue that the evidence the court relied upon to conclude that the partners here did not so agree fails the substantial evidence test. Instead, he argues the “trial court was wrong when it concluded that the partnership agreement did not survive the creation of SGRL.” He makes numerous assertions and conclusory statements in arguing why the evidence should be interpreted as favorable to him. But at the end of the day, he is essentially offering the same arguments he advanced at trial and asking this court to reach a different result, which, of course, we cannot do. There was substantial evidence for the court to conclude the partnership did not survive the formation of SGRL.

2. Breach of Fiduciary Duty

The trial court concluded that because the partnership was merged with the corporation, and all of the alleged breaches of contract occurred thereafter, Baharian-

Mehr could not premise any of his claims for breach of contract on the partnership agreement. Accordingly, the court found that Baharian-Mehr had not met his burden of proof on his claim for breach of fiduciary duty. Any such duty was premised on the partnership agreement.

As we discussed above, the court's determination about the status of the partnership was correct. The breaches of duty upon which Baharian-Mehr bases this claim are all after the date of incorporation, which was in 2001. Thus, the court correctly concluded Baharian-Mehr had not established any breach of fiduciary duty.

3. Accounting

With respect to Baharian-Mehr's cause of action for an accounting, the court found that "SGRL kept all the necessary books and records, that those records were in order, and that an accounting is not warranted or necessary." He argues that the court, pursuant to Code of Civil Procedure section 639, subdivision (a)(1), should have ordered a reference "to determine all SGRL monies misappropriated by the individual defendants so that [he] can prove his damages"

Code of Civil Procedure section 639, subdivision (a)(1) states that the court, upon motion of the parties or its own motion, may appoint a referee "[w]hen the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein."

Baharian-Mehr does not point to anywhere in the record where he made such a motion, nor does he adequately establish that the court erred by failing to make such an order on its own motion. He complains that the trial court wrongfully excluded the evidence of SGRL's accounting records for lack of foundation, but that issue is not before us in this appeal. (Cal. Rules of Court, rule 8.204 (a)(1)(B) [each point must be stated "under a separate heading or subheading summarizing the point"].) Even if it was before us, he fails to support it with legal argument rather than conclusory assertions.

Baharian-Mehr then goes on to assert that he could not prove his damages without SGRL's books because 13,000 pages of daily sheets that showed the gross income for Imperial Showgirls had not been produced. (He does not mention whether these documents were ever requested in discovery.)

Baharian-Mehr also points out, however, that the court heard testimony from an accountant, Dr. Barbara Luna, that SGRL's books and records were in order. Under the substantial evidence standard of review, "we 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . .' [Citation.]" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.) Under that standard, Baharian-Mehr did not establish the right to an accounting, and therefore, the court did not err in finding for defendants on this cause of action. (*Baxter v. Krieger* (1958) 157 Cal.App.2d 730, 732 ["Before an accounting is in order, the right to an accounting must be established."].)

4. Loans vs. Capital Contributions

In addition to his other claims, Baharian-Mehr sought a declaration from the court that any payments made by Glenn and Theron to SGRL constitute capital investments, rather than loans. The court found that Baharian-Mehr "knew all along that that the \$245,000 that Glenn Smith and Theron Smith put into the business was going to be characterized as a loan. A meeting with Plaintiff Mehr was held with the accountant for SRGL where the structure, benefits, and detriments were thoroughly discussed. At that meeting it was agreed that \$245,000 of the total monetary contribution would be classified as an interest-free loan to SGRL. From 2002 to the time the business was closed, the books and records of the business, along with the filed tax returns, all confirmed this agreement. The Court finds that Plaintiff Mehr acceded to that characterization and knew that it would happen. The Court also finds that Plaintiff Mehr obtained a tax benefit as a result of this characterization. The Court further finds that during the entire operation of the business, neither Glenn Smith nor Theron Smith ever

got a dime of their principal back and that their principal was completely unable to work for them during this time. In addition, the Court finds that neither Glenn Smith nor Theron Smith was ever paid any interest on their money. This constitutes substantial consideration that they contributed, which justifies their equity interest. In addition, the Court finds that the \$30,500 in additional contributed capital justified their equity interest in the corporation.”

Once again, rather than arguing that the facts set forth by the court are not supported by substantial evidence, Baharian-Mehr selectively cites conflicting evidence that supports his desired outcome. Indeed, each of the court’s factual findings is supported by admissible evidence, and it does not matter if this court might have viewed matters differently. We decline Baharian-Mehr’s invitation to retry the case, and find that he has not established a lack of substantial evidence to support the court’s findings.

5. *Direct vs. Derivative Action*

The trial court found: “The Plaintiff proceeded with direct claims, rather than derivative claims in this action. Derivative and direct claims *cannot be maintained in the same lawsuit*. These claims are, by definition, *mutually exclusive* and may either be maintained by the corporation or an individual, not both. *Schuster v. Gardner*, 127 Cal.App.4th 305, 312 (2005). The Plaintiff did not plead, nor did he prove the requirements to maintain a derivative action and did not meet the requirement under Corporations Code section 800(b)(2) to proceed with derivative claims. [¶] The Plaintiff has contended that his claims in this action were personal in nature and not derivative. The Plaintiff in his Supplemental Trial Brief cited the case of *Jara v. Suprema Meats, Inc.* for the valid proposition of law that a shareholder may sue the majority shareholders on his own behalf if the majority shareholders take actions that diminish the value of his stock, in particular, as opposed to the value of the stock of the company overall. (2004) 121 Cal.App.4th 1238, 1254. Of the items complained of by Plaintiff Mehr, the only area where there was an argument made that it diminished his stock in particular, as opposed

to the value of the stock of the company overall, was the characterization of the \$245,000 put into the business by Glenn Smith and Theron Smith. As for all of the other items complained about by Plaintiff Mehr, the Court finds that these were acts or omissions done in the operation of the company that would diminish the value for everybody's stock across the board and, hence, were derivative claims." The court then went on to discuss the issue of whether Glenn and Theron's contributions were loans or capital contributions, which we addressed above.

Somehow what Baharian-Mehr gleaned from the court's statement above was that he "was precluded from bringing a direct action against defendants, but instead was required to bring a derivative action." The court found that Baharian-Mehr could bring a direct action with respect to the loan versus contribution issue, but all derivative claims were precluded. The court was correct.

6. Business Judgment Rule

Finally, Baharian-Mehr argues, the business judgment rule does not provide immunity for the individual defendants' wrongful acts. His argument in the opening brief on this point consists of three paragraphs setting forth the generally applicable legal rule, and two paragraphs reciting the allegations in his complaint.

He then states: "The allegations of corporate mismanagement and misappropriation of corporate funds are not errors or mistakes in judgment in that defendants were not disinterested and independent, acting in good faith, and reasonably diligent in informing themselves of the facts. [¶] The business judgment rule does not protect the individual defendants."

This, obviously, is not an argument about whether the evidence was sufficient; indeed it refers to no evidence at all. In his reply brief, the closest he comes to addressing this issue is: "Appellant offered evidence on mismanagement. E.g., Leroy Smith abandoned his duties as on-site manager in September 2007. . . . Please see Exhibits 80, 81, 83, and 85. Please see paragraph 8 of the declaration of Theron Smith

and paragraph 8 of the declaration of E. Glenn Smith in support of Theron Smith's motion for summary judgment . . . which state that Leroy Smith from 2002 until early September 2007 operated the adult entertainment business of SGRL as on-site manager. The trial court finding that there was no mismanagement is not substantiated by the evidence." This recitation of evidence, without any discussion of the meaning or import of that evidence, does not lead us to the conclusion that the evidence the trial court used to reach a contrary finding was insufficient. Further, as a legal argument, it is entirely inadequate. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.)

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal. To the extent they may be entitled to attorney fees on appeal, defendants may make the appropriate motion in the trial court.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.